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In the Supreme Court of the United States

OCTOBER TERM, 1979

DONALD JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 597 F.2d 485. The opinion of the district court (Pet. App. 11a-22a) is reported at 390 F. Supp. 1017.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1979. A petition for rehearing was denied on August 6, 1979 (Pet. App. 10a). The peti-

tion for a writ of certiorari was filed on September 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction should be reversed because of the use at trial of evidence obtained by federal officers in a warrantless search of petitioner's premises.

2. Whether petitioner is entitled to a new trial because a juror was offered a bribe during the trial that resulted in his conviction.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing an unregistered distillery, in violation of 26 U.S.C. 5179(a) and 5601(a)(1), engaging in the business of a distiller without filing an application and receiving notice of registration, in violation of 26 U.S.C. 5171(a) and 5601(a)(2), carrying on the business of a distiller without having given bond, in violation of 26 U.S.C. 5173(a) and 5601(a)(4), engaging in the business of a distiller with intent to defraud the United States of the tax on the spirits distilled, in violation of 26 U.S.C. 5602, and conspiracy to commit those offenses, in violation of 18 U.S.C. 371.[1] He was sentenced to consecutive

[1] At the close of the government's case, the district court dismissed one count charging petitioner with unlawful production of distilled spirits, in violation of 26 U.S.C. 5601(a)(8) (Tr. 784). The jury acquitted petitioner on one count charging him with the possession and transfer of unstamped distilled spirits, in violation of 26 U.S.C. 5205(a)(2). Co-defendant Bobby J. Herndon was convicted on the same charges as petitioner. Co-defendant William Mimbs was acquitted on all counts. Co-defendant Thomas Jones was found incompetent, and his case was therefore severed from petitioner's before trial. Thomas Jones died soon after petitioner's trial was completed.

terms of four years' imprisonment on the conspiracy count and three years' imprisonment on the possession count. He was also sentenced to concurrent terms of three years' imprisonment on each of the remaining counts, those sentences to be served concurrently with the sentences imposed on the conspiracy and possession counts.[2] The court of appeals affirmed (Pet. App. 1a-9a).

1. Before trial, petitioner and co-defendants Herndon and Thomas Jones moved to suppress evidence seized from premises leased by petitioner in a rural area of Dade County, Florida. The evidence adduced at the suppression hearing showed that at approximately 7:30 p.m. on April 12, 1974, two local police officers were dispatched to 19955 S.W. 248th Street, the location of the house and barn rented by petitioner. The officers were sent to investigate a telephone report that shots had been fired in the area (Pet. App. 12a). As the officers approached the address, they were met by a woman who advised them that one of the participants in the alleged shooting

[2] Petitioner was convicted on August 1, 1975, but failed to appear for sentencing on August 20, 1975. He remained a fugitive for nearly three years and was not sentenced until June 23, 1978, following his apprehension.

was sitting in an automobile parked nearby (*id.* at 13a). The officers found co-defendant Thomas Jones sitting in a car parked at the corner specified by the unidentified woman (*ibid.*). A bystander identified Jones as a resident at the address to which the officers had been sent and a participant in the alleged shooting incident (*ibid.*).

Officer Robert Dwyer proceeded to the house while Officer David Charter remained with Jones, who was not yet under arrest. Several neighbors informed Officer Dwyer that they had observed three white males leave the barn shortly before the shots were fired. According to the reports, one of the men entered an automobile and drove it around to the front of the house and the other two men went inside the house. When they came out, the shots were fired in the immediate area (Pet. App. 13a). After receiving this information, Officer Dwyer heard the telephone ring inside the house. The officer looked through the window into the living room and then entered the house and answered the telephone (*ibid.*).[3] A voice on the other end of the line said, "You hit Bobby Joe and now you're going to prison" (S.H. 17).[4]

Officer Dwyer looked through the house for injured persons or suspects. Finding none, Dwyer called Officer Charter by radio and asked him to come to the

[3] The door of the house was unlocked and partially open (Pet. App. 13a).

[4] "S.H." refers to the transcript of the pretrial hearing on petitioner's motion to suppress.

barn (Pet. App. 14a). By this time, Officer Charter had arrested Thomas Jones for loitering and prowling "because he could not explain his presence in the area" (*ibid.*). Officer Charter arrived at the barn with Jones in the back seat of his patrol car. The two officers entered the barn through a door that was four to six inches open (*ibid.*). Equipped with flashlights, the officers searched the barn for possible victims of the shooting. During the brief search, the officers saw what appeared to be a still in the rear portion of the barn (*ibid.*). The officers called for additional assistance and were joined shortly by local police lieutenant Tom Lyons. Lieutenant Lyons entered the barn with the two officers and observed the still. He then telephoned the police station and asked that Agent George Nowicki of the Bureau of Alcohol, Tobacco and Firearms be notified of the discovery of the still (*ibid.*).

ATF Agents Nowicki and Jimmy Harmon arrived at the barn at approximately 10 p.m. (Pet. App. 15a). Agent Nowicki read Thomas Jones his rights. On a socket wrench head taken from Jones when he was searched incident to his arrest, Agent Nowicki found "mash" from a distilling process (*ibid.*). Agent Nowicki then asked Jones to remove his shoes for possible evidence, and Jones did so (S.H. 116). Agents Nowicki and Harmon entered the barn and saw the still. They also noticed jugs of whiskey stacked near the vats of the still (S.H. 305). At trial, Agents Nowicki and Harmon testified that they found 580 gallons of clear white whiskey in five-gallon

plastic jugs standing in front of the still (Tr. 446-447, 458-459). The agents observed that an electrically powered water pump near the front of the barn supplied the still with water.

The agents followed the pump's electric wires from the barn into the house. In an open closet next to the electrical panel where the wires terminated, the agents found several gas company receipts.[5] In addition, the agents seized a telephone directory from a partially open table drawer in the kitchen[6] and a pair of shoes that were on the bedroom floor and had mash on the soles (Pet. App. 15a; S.H. 118-120).

The agents then looked into a truck-camper parked in front of the house (Pet. App. 16a). Inside the truck were cardboard cartons with labels identical to those found on similar cartons that the agents had seen next to the still.[7] The agents opened the truck and found that some of the cartons were soaked with whiskey and that the inside of the truck smelled of whiskey. A search of the glove compartment revealed an auto repair receipt signed by co-defendant Mimbs (*ibid.*; S. H. 120-122). Leaving the truck, the agents went behind the house and discovered a small shed.

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[5] The receipts reflected several purchases of butane gas in large amounts sufficient for the manufacture of illicit whiskey (see, *e.g.*, Tr. 237-279, 282).

[6] Several local telephone numbers, including petitioner's, were written on the inside cover of the directory (S.H. 119).

[7] At trial, the government showed that the cartons had contained plastic jugs used to bottle the illicit whiskey (Tr. 63-82).

They entered the shed and found 70 gallons of whiskey packaged in 14 five-gallon plastic jugs (S.H. 124-126, 157-158). The agents then returned to the automobile in which Thomas Jones had been sitting when he was first seen by the county police officers. Inside, the ATF agents saw a six-gallon green plastic jug similar to one found near the still (Pet. App. 16a; S.H. 126, 150-151). Under the front seat of the car, the agents discovered a hydrometer (Pet. App. 16a; S.H. 129).

2. The district court denied the motion to suppress. The court found that the county police officers' discovery of the still was lawful, because it occurred during the course of a lawful search for possible victims of the alleged shooting incident. "Being in a place where they had a right to be, the officers found the still because it was in plain view" (Pet. App. 17a-18a). The district court also sustained the federal agents' subsequent search of the barn because it "was based upon a legal search by the county officers * * * [and] was directly related to the object of the county search" (*id.* at 19a). Relying on *United States* v. *Green*, 474 F.2d 1385 (5th Cir.), cert. denied, 414 U.S. 829 (1973), the court explained (Pet. App. 21a):

> The rationale which justifies the federal search is that the subsequent intrusion does not significantly increase a preexisting legitimate interference with a protected interest. * * * [T]he subsequent search does not significantly add to the invasion of privacy caused by the initial

> search * * *[. T]he successive intrusions [were] close in time, practically identical in nature and analytically and factually separable only because made by two different sovereigns.

The court did not separately discuss the validity of the search of Thomas Jones incident to his arrest or the validity of the federal agents' search of the house rented by petitioner, the truck-camper parked outside, the shed behind the house, or the car in which Jones was sitting when first seen by the county police officers.

3. On August 3, 1975, two days after the jury returned its verdict, juror Barbara Toomer was contacted by Debra Jones, petitioner's wife, and a man later identified as Willie Lucas. Lucas solicited the juror's agreement that petitioner had been "shanghaied." The juror reported this incident to the district court, and, on August 4, the court ordered the United States Attorney and the ATF to conduct an investigation (Pet. App. 2a).

On August 5, petitioner filed a motion to interview the jurors. In support of the motion, petitioner submitted an affidavit in which Lucas described certain post-verdict statements allegedly made by another juror, Arlie Crooms. Lucas stated that Crooms had told him that she did not feel the proper verdict had been rendered, that there was no proof that petitioner owned the still, and that she had voted for conviction only because of pressure from other jurors and her own illness during the deliberations (*id.* at 2a-3a).

During the court-ordered investigation, ATF agents interviewed all the jurors. Juror Irma Reboso revealed that during the trial Crooms told her that she, Crooms, had been offered $1000 to vote for acquittal. When asked about this reported bribe offer, Crooms initially denied any such improper approach. During a subsequent interview, however, she recanted and informed the ATF that Lucas had offered her a bribe to vote to acquit petitioner (*id.* at 3a).

On August 20, 1975, the district court conducted a hearing at which jurors Toomer, Reboso, and Crooms testified. Crooms acknowledged telling Reboso of the bribe offer. She stated, however, that they had not discussed the matter further and that she had "decided to forget about it" (H. Tr. 15-19).[8] Reboso confirmed her conversation with Crooms (H. Tr. 28-32). She testified that she had paid little attention to the incident, that she had not discussed it with anyone else, and that it had not affected her ability to render a fair and impartial verdict (H. Tr. 33-38). Toomer related the details of the post-verdict approach by Lucas and petitioner's wife (H. Tr. 40-43). Although afforded the opportunity to do so, petitioner's counsel did not question any of the three juror witnesses. In particular, he did not ask Crooms or Reboso whether their votes were affected in any way by the bribe offer.

At the conclusion of testimony, petitioner moved to set aside the verdict and, apparently, for a new trial (H. Tr. 44-45; Pet. App. 4a n.1). Petitioner's mo-

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[8] Crooms also corroborated many of the allegations in Lucas' affidavit concerning her comments after the trial (H. Tr. 19-23).

tion did not allege specifically that the jury was improperly biased against him as a result of the bribe attempt during trial. Rather, the motion seemed to concentrate on the doubts expressed by Crooms after trial concerning the correctness of the verdict. The district court denied petitioner's motion, stating that "[t]here is nothing appearing from the testimony of these [juror] witnesses to indicate a valid ground to challenge the verdict in this case" (H. Tr. 51).

4. On appeal, petitioner contended that all the evidence seized by the ATF agents should have been suppressed. Petitioner argued that, because the local police officers' search of the house and barn established that no victims or suspects in the alleged shooting incident were in either building, the federal agents' subsequent warrantless entry was not supported by exigent circumstances and was therefore unlawful. In support of this proposition, petitioner relied heavily on this Court's decisions in *Michigan* v. *Tyler*, 436 U.S. 499 (1978), and *Mincey* v. *Arizona*, 437 U.S. 385 (1978). Petitioner did not separately attack any specific portions of the federal agents' search as unlawful, distinct from the initial search of the barn. See Appellant's Br. 20-21, 32-41; Reply Br. 11-18.

Citing *United States* v. *Green*, *supra*, and *United States* v. *Brand*, 556 F.2d 1312 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978), the court of appeals sustained the challenged search and seizures for the reasons stated by the district court (Pet. App. 8a-9a). Without deciding whether *Tyler* and *Mincey*

are in any way inconsistent with *Green* and *Brand*, the court of appeals ruled that this Court's 1978 decisions "should not be applied retroactively on the facts of this case" (*id.* at 9a).

Petitioner also argued that he is entitled to a new trial because the court-ordered posttrial investigation showed that Lucas attempted to bribe one of the jurors during trial and that the affected juror told at least one other juror of the bribe offer. The court of appeals rejected this contention (Pet. App. 5a-8a) without addressing the question whether the bribe attempt unfairly prejudiced petitioner's position at trial. Treating petitioner's appeal as an appeal from the denial of the oral new trial motion by counsel at the August 20, 1975 hearing, the court stated that, under Fed. R. Crim. P. 33, a new trial motion made more than seven days after verdict "cannot be entertained unless it is based on newly discovered evidence" (Pet. App. 5a). The court further declared that a new trial motion based on newly discovered evidence can succeed only if "that evidence [was] in fact unknown to the movant until after the verdict" and the movant's "failure to discover [the evidence] prior to verdict was not due to his lack of diligence" (*id.* at 6a-7a). Because petitioner "presented no evidence whatever on the issues of his lack of knowledge or his due diligence" and, in fact, did not even disclaim pre-verdict knowledge of the bribe offer (*id.* at 8a), the court of appeals concluded that it was unnecessary to inquire into possible prejudice arising from the attempted jury tampering.

ARGUMENT

1. Petitioner now repeats his argument (Pet. 15-20) that all the evidence seized by the ATF agents should have been suppressed because no exigent circumstances justified the agents' warrantless search of any of the areas in or around the house and barn on the leased premises. Petitioner again fails to differentiate among the various areas entered by the federal agents and the various kinds of evidence seized. Instead, he argues simply that, because the county police officers' search of the house and barn uncovered neither suspects nor victims nor evidence of the alleged shooting, there was no justification for a later warrantless entry by federal agents anywhere on the premises. Apparently conceding for the sake of argument that the ATF agents' search and seizures were proper under Fifth Circuit law at the time they occurred, petitioner contends that this Court's subsequent decisions in *Michigan* v. *Tyler*, *supra*, and *Mincey* v. *Arizona*, *supra*, demonstrate the illegality of the agents' conduct. The court of appeals found it unnecessary to address that argument, because it held that, to the extent *Tyler* and *Mincey* might be thought to render invalid searches previously permissible under Fifth Circuit law, those decisions should not be applied retroactively. See *United States* v. *Peltier*, 422 U.S. 531 (1975), and cases cited therein. In this connection, petitioner now presents only the question whether the court of appeals erred in its retroactivity ruling; he does not ask this Court to review the lawfulness of each

portion of the search performed by Agents Nowicki and Harmon.

This case does not present a suitable occasion for the Court to resolve whatever retroactivity issues may arise from the decisions in *Tyler* and *Mincey*. The primary incriminating evidence against petitioner was seized in the search of the barn. There, the county police and the federal agents found the still, several hundred gallons of illegal whiskey, and assorted paraphernalia used in the illicit distilling operation. Petitioner conceded in the court of appeals (Appellant's Br. 11) that Officers Dwyer and Charter acted lawfully in searching the house and barn for suspects or victims in the reported shooting incident. He does not withdraw that concession here. The county officers discovered the still in the course of their legal search of the barn. Under these circumstances, *Tyler* and *Mincey* provide no support for petitioner's objection to the federal agents' entry and search of the same building two or three hours later. Neither in those cases nor in any other has this Court suggested that a law enforcement officer who observes contraband or probable illegal activity on private premises where he has a right to be is constitutionally precluded from inviting other officers to join him in investigating the criminal behavior he has discovered. Indeed, *Tyler* holds precisely the opposite.

In *Tyler*, a local fire chief arrived at the scene of a fire shortly after the blaze had been extinguished. While firemen watered down the smoldering embers,

the chief was informed by one of his lieutenants that two plastic containers of flammable liquid had been found in the building. After the chief examined the containers, he called a local police detective who came to the scene and inspected the burned building. The chief and the detective removed the containers and took them to the fire station for safekeeping. Approximately four hours later, after all the firefighters had departed, the chief and his assistant returned to the scene and made a cursory inspection of the building. The assistant and the detective returned again an hour later and conducted a more thorough search during which they found and seized significant additional evidence of arson. None of the entries by the chief, his assistant, or the detective was supported by a warrant. Nonetheless, the Court held (436 U.S. at 510-511) that the searches conducted at the close of the firefighting operation and several hours later were lawful. After stating generally that fire "officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished," the Court observed that the additional entries later in the day "were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence" (*id.* at 510, 511).

The reasoning in *Tyler* is entirely consistent with the Fifth Circuit's approach in *United States* v. *Brand*, *supra*, and *United States* v. *Green*, *supra*, on

which the court of appeals in the present case relied. As the court stated in *Brand* (556 F.2d at 1317):

> The [Fourth] amendment protects the citizen against invasion of privacy. Once that interest is invaded legally by an official of the State, the citizen has lost his reasonable expectation of privacy to the extent of the invasion. * * * [A]dditional investigators or officials may therefore enter a citizen's property after one official has already intruded legally. * * * Later arrivals may join their colleagues even though the exigent circumstances justifying the initial entry no longer exist. * * *

See also *Steigler* v. *Anderson*, 496 F.2d 793, 797-798 (3d Cir.), cert. denied, 419 U.S. 1002 (1974).

Here, the ATF agents' inspection of the still and the related evidence of illegal activity in the barn involved no further intrusion into an area in which petitioner retained a legitimate expectation of privacy. Once the still had been lawfully discovered by law enforcement personnel, petitioner no longer could have had any legitimate expectation that the contents of the still's metal vats and the surrounding plastic jugs would remain undisturbed. The ATF agents' seizure of incriminating evidence from the barn was thus entirely proper.

For reasons that are easily understandable, petitioner does not make any separate contention that this Court should consider the retroactivity of *Tyler* and *Mincey* solely for the effect those decisions may have on the legality of some aspect of the federal

agents' investigation other than the search of the barn. *Tyler* and *Mincey* held that warrantless entries or searches involving intrusions significantly different from or broader than an initial lawful intrusion cannot be justified solely on the basis of the initial entry.[9] Petitioner might argue that a proper application of the Fourth Amendment principles discussed in those cases would cast doubt on the propriety of the ATF agents' seizure of evidence at one or more locations outside the barn.[10] But petitioner does not advance

[9] *Tyler* refused to approve a warrantless police entry and search of the burned building nearly a month after the fire, and *Mincey* condemned an extensive four-day search of an apartment in which an abortive drug transaction had led to the murder of an undercover police officer. The State in *Mincey* attempted unsuccessfully to defend the search on the ground that it involved an invasion of privacy no more intrusive than the emergency police entry immediately after the shooting to arrest the suspects and aid the victims.

[10] Petitioner would not, in any event, be able to assert any legitimate expectation of privacy in the items seized from Donald Jones at the time of his arrest or in the car in which the local police found Jones on their way to investigate the shooting incident. He therefore could not raise any Fourth Amendment objection to the introduction of evidence obtained from those sources. *Rakas* v. *Illinois*, 439 U.S. 128 (1978); *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). The ATF agents' search of the truck-camper was lawful, because the agents were properly present on petitioner's premises when they looked through the truck's window and saw cardboard cartons similar to those found near the still in the barn. The cartons and their labels, combined with the truck's location, gave the agents probable cause to believe that the truck contained evidence of a crime. Under this Court's decisions, the ensuing entry and search were therefore proper. See *Texas* v. *White*, 423 U.S. 67 (1975); *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925). The agents' search of the house was not clearly more intrusive than the previous, concededly lawful, entry by the county police officers, and in any event produced little probative evidence of petitioner's participation in the illegal distilling operation. Finally, since the local officers apparently did not search the shed behind the house for victims or suspects in the alleged shooting, the ATF agents' entry there was arguably justifiable as a continuation of the investigation into the reported shooting. Moreover, the 70 gallons of illegal whiskey found in the shed could hardly have had any substantial independent effect on the jury's decision, in light of the much larger quantity of the same product found earlier in the barn.

any such argument, presumably because, even if accepted, it would be unavailing. The critical evidence of petitioner's guilt was found in the barn. As we have shown, at least that portion of the ATF agents' search was lawful, under *Tyler* as well as earlier Fifth Circuit precedents. The evidence seized from the house, the shed, the truck-camper, Donald Jones, and the car in which he was sitting was either cumulative or not connected with petitioner. In light of the strong incriminating evidence discovered in the barn, suppression of any or all of the evidence found elsewhere could not reasonably have been expected to affect the jury's verdict.

2. Petitioner also contends (Pet. 9-15) that the district court should have set aside the verdict and granted a new trial because of the bribe offer to the juror Crooms. Relying on *Remmer* v. *United States*, 347 U.S. 227 (1954), petitioner asserts that any extraneous communication with one or more jurors during trial is "presumptively prejudicial" and im-

poses on the government the heavy burden of showing that the contact was harmless to the defendant. Petitioner ignores the several significant obstacles to acceptance of his argument.

In the first place, there is considerable doubt whether petitioner raised in the district court the question of the bribe offer's alleged prejudicial effect. During the August 20, 1975 hearing prompted by the posttrial contact with the juror Toomer by petitioner's wife and Lucas, petitioner's counsel did not question either Crooms or Reboso about the possible effect on the jury's deliberations of the bribe attempt directed at Crooms. Counsel's motion to set aside the verdict at the close of the hearing (Pet. App. 4a n.1) did not call the court's attention to the harm allegedly suffered by petitioner as a result of the bribe offer. Rather, it seemed to concentrate on the representations in Lucas' affidavit, corroborated by Crooms and in part by Reboso, that Crooms was not feeling well during the jury's deliberations and voted to convict petitioner at least in part because she wanted to go home and feared that continued disagreement with her fellow jurors would prolong her jury service through a retrial of petitioner on the pending charges. As the district court correctly held (H. Tr. 46-51), such matters are not a proper basis for impeachment of jury's verdict. See Fed. R. Evid. 606(b); *McDonald* v. *Pless*, 238 U.S. 264 (1915). Petitioner does not now suggest otherwise.

Secondly, petitioner has neither alleged nor proved that he was not responsible for and did not know

about the bribe attempt before verdict. Instead, he has relied entirely on his assertion that the government adduced no evidence to show that he knew of the bribe offer during trial or was involved in the attempted jury tampering. As the court of appeals correctly observed (Pet. App. 7a), *Remmer* was litigated and decided on the assumption that, although the court and the prosecutor were aware of the improper jury contact during trial, the defendant first learned of it by reading about it in the newspapers after his conviction. This is a significant difference between the two cases. Petitioner should not be permitted to demand either that the government prove lack of prejudice or that he be granted a new trial when he is not willing even to allege that he was not connected with and did not know about the bribe attempt before verdict. Otherwise, a defendant who learns about such a contact during trial, whether or not he is responsible for it, will be encouraged to remain silent and hope for an acquittal, secure in the knowledge that a conviction will be set aside unless the government can carry the burden imposed by *Remmer*.

Petitioner's position is especially objectionable in the circumstances of the present case, because neither he nor Lucas appeared (see Pet. App. 3a-4a) at the hearing held to investigate both the posttrial contact with juror Toomer by Lucas and petitioner's wife and the allegations in Lucas's affidavit concerning juror Crooms' posttrial explanation of her vote to

convict.[11] The government was thereby prevented from inquiring into the reasons for the bribe attempt, the source of the idea that such an effort should be made, and petitioner's knowledge of the incident. Petitioner now concedes (Pet. 11) that "[e]vidence that the defendant knew about the bribe attempt before the verdict but chose to do nothing would establish * * * harmlessness, because the error would have been invited by the defendant." But petitioner seeks to take advantage of his fugitive status and Lucas's trip to Nassau at the time of the August 20 hearing by arguing that the government failed to demonstrate the extent of his involvement in or knowledge of the attempted jury tampering. The court of appeals properly rejected this effort.[12]

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[11] Petitioner was apparently last seen on the morning of the day of the hearing; he disappeared between that time and his scheduled court appearance later in the day. He was ultimately apprehended three years later.

[12] The court of appeals based its decision in part on the fact that petitioner's motion to set aside the verdict was made more than seven days after trial. The court therefore treated the motion as a motion for a new trial based on newly discovered evidence under Fed. R. Crim. P. 33. Although the matter need not be resolved in this case because petitioner's motion *was* made outside the seven-day period ordinarily provided for new trial motions, it is not clear that the standards for evaluating requests for a new trial based on alleged jury tampering should vary with the time when the motion is filed. Even if such a motion is made promptly after verdict, the district court should still view it with great skepticism if it does not allege lack of knowledge of the improper contact during trial.

Finally, assuming arguendo that the question of the bribe attempt's effect on the jury was properly preserved by petitioner, the district court's posttrial inquiry sufficiently established that Lucas's improper contact with juror Crooms during trial did not deny petitioner a fair verdict. Testimony at the hearing showed that, although Crooms was initially upset by the incident and asked for advice on the subject from juror Reboso (H. Tr. 18), she soon "decided to forget about it" (H. Tr. 19) and did not discuss the matter further with Reboso or any other juror. Crooms acknowledged that she should have reported the offer to the court immediately, but she explained that she "didn't say anything" because she did not intend to "become involved" with the bribe (H. Tr. 25).[13] Similarly, Reboso testified that, after she learned from Crooms of the bribe offer, she "didn't think of it at all" (H. Tr. 32). Reboso was confident that the information relayed by Crooms did not affect her ability to render a fair and impartial verdict (H. Tr. 35-38). In these circumstances, the district court did not err in denying petitioner's motion to set aside his conviction (H. Tr. 51). See *United States* v.

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[13] Crooms' reaction to the improper contact by Lucas further distinguishes this case from *Remmer*. Unlike the affected juror in the earlier case, Crooms was not sufficiently disturbed by the contact to notify the court, and consequently there was no law enforcement investigation of the matter during the trial that may have affected the jurors' deliberations. In *Remmer*, the district court ordered an FBI investigation during trial, and the affected juror was visited at his place of business by a federal agent who informed him of the court-ordered inquiry.

Fleming, 594 F.2d 598, 608 (7th Cir.), cert. denied, No. 78-6335 (June 11, 1979).

Because of his personal familiarity with the evidence presented at trial, the general demeanor of the proceedings, and the conduct of the jury, the trial judge is uniquely well situated to evaluate the likelihood that an isolated extraneous communication with a single juror would have irreversibly contaminated the impartiality of the jury's deliberations. For this reason, several courts of appeals have recognized that district courts inevitably exercise a substantial degree of discretion in ruling on claims of unfairness at trial and that such rulings should not be overturned unless the facts show that the trial judge clearly abused his discretion in assessing the probability of prejudice in a given case. *United States* v. *Albert*, 595 F.2d 283, 290 (5th Cir.), cert. denied, No. 79-207 (Nov. 26, 1979); *United States* v. *Boscia*, 573 F.2d 827, 832 (3d Cir.), cert. denied, 436 U.S. 911 (1978); *Morgan* v. *United States*, 399 F.2d 93, 97 (5th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); *Little* v. *United States*, 331 F.2d 287, 295 (8th Cir.), cert. denied, 379 U.S. 834 (1964). No such abuse occurred here.

Petitioner insists (Pet. 12-13) that the court of appeals' decision conflicts with *Marshall* v. *United States*, 436 F.2d 155 (D.C. Cir. 1970). Petitioner's own argument demonstrates the fallacy of that assertion, however. Not only was the evidence adduced at the posttrial hearing sufficient to show lack of prejudice in the present case, but petitioner himself

admits (Pet. 11) that, if he did know of the attempted bribe during trial but kept silent, he would have no legitimate ground for seeking to set aside the verdict. Petitioner thus concedes that, unlike the improper lineup issue considered in *Marshall*, the proper resolution of a jury tampering question does depend in part on the extent of the defendant's konwledge during trial. Moreover, the court of appeals in *Marshall* addressed only constitutional error, and it is not certain that the procedure and evidentiary burden established in *Remmer* are constitutionally compelled. Neither this Court's initial opinion in *Remmer* nor its later opinion after remand (350 U.S. 377 (1956)) purports to find in the Constitution a basis for the "presumption of prejudice" on which petitioner now relies. Petitioner's alleged conflict with *Marshall* is thus speculative at best and does not provide an appropriate occasion for review by this Court.[14]

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[14] The decision in *Marshall* was premised upon the proposition that the claim in that case could have been raised in a collateral attack upon the conviction, without regard to whether the defendant knew or should have known of the existence of the claim prior to trial; therefore, the court concluded, it was pointless to subject the defendant to a due diligence requirement simply because he elected to proceed under Fed. R. Crim. P. 33. Subsequent to the decision in *Marshall*, Fed. R. Crim. P. 12 has been amended to provide for a waiver of claims for suppression of evidence if not timely raised prior to trial, unless excused by a showing equivalent to the due diligence showing required under Rule 33. Since the premise that underlay *Marshall* is no longer viable, the case should not in any event be viewed as creating a conflicting precedent requiring the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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